
CLOSED LOOPHOLE: INVESTIGATING FORCED LABOR IN CORPORATE SUPPLY CHAINS FOLLOWING THE REPEAL OF THE CONSUMPTIVE DEMAND EXCEPTION

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INTRODUCTION

In 2015, the United States took a meaningful step to improve its efforts to combat forced labor by repealing the consumptive demand exception in the Tariff Act of 1930. Customs and Border Protection (CBP) now has the opportunity to more effectively prevent multinational corporations (MNCs) from importing goods that forced labor has produced. To carry out this mission, CBP needs to decide how far down a corporation's supply chain it should investigate. SECTION 1 of this article discusses the background surrounding the repeal of the consumptive demand exception, and the difficulties of investigating supply chains due to the large number of entities involved. SECTION 2 advocates for a reasonable method for CBP to investigate supply chains. This Article argues that CBP can better hold MNCs accountable for forced labor in their supply chains by promulgating a requirement that MNCs adopt a reasonable supply chain accountability program and drawing adverse inferences against MNCs that do not conform to this program. This reasonable accountability program should incorporate methods that experts agree are proven to be effective in combating forced labor. SECTION 3 outlines tactically sound criteria to be included in reasonable accountability programs that CBP should impose on MNCs.

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SECTION I

A. Background

Modern slavery is on the rise. In 2016, the International Labor Organization (ILO) estimated 24.9 million workers under forced labor worldwide.¹ This is a steady increase from the ILO's 2012 estimate of 20.9 million.² The majority of modern forced labor occurs in the private sector.³ Half of all forced labor victims endure debt bondage, in which personal debt is used to forcibly obtain their labor.⁴ The pervasiveness of forced labor in the private sector is largely driven by MNCs, and increasing profits, who frequently overlook the risk of forced labor in pursuit of lower labor costs.⁵ These MNCs subcontract their businesses to third parties in other countries through a practice known as "global outsourcing:" a practice with an annual growth rate between 12% and 26%.⁶ Suppliers who use global outsourcing are particularly infamous for forced labor abuses.⁷

Federal and state governments are confronting the private sector's growing dependence on global outsourcing and forced labor. California recently passed the California Transparency in Supply Chains Act of 2010.⁸ This act imposes the duty on retail sellers and

¹ INTERNATIONAL LABOUR ORGANIZATION, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 9 (2017).

² INTERNATIONAL LABOUR ORGANIZATION, ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012).

³ INTERNATIONAL LABOUR ORGANIZATION, *supra* note 1, at 10.

⁴ *Id.* at 10–11.

⁵ Ciara Torres-Spelliscy, *Slaves to the Bottom Line: The Corporate Role in Slavery from Nuremberg to Now*, 46 STETSON L. REV. 167, 167 (2016).

⁶ Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 425 (2015).

⁷ See *How Companies Are Rooting Out Slavery in their Supply Chains*, THOMSON REUTERS (Jan. 1, 2016), <https://blogs.thomsonreuters.com/answerson/how-companies-are-rooting-out-slavery-in-their-supply-chains/> [<https://perma.cc/YPA3-HDX9>] ("In cases where a distant supplier uses a third party to source manpower it is easy for some very important things to slip through the cracks," says John Solomon, the director of threat research at Thomson Reuters World-Check."); see also *id.* ("According to Dan Viederman, the CEO of Verité, a U.S. anti-slavery organization that consults companies — including HPE — on risks in their supply chains, one reliably accurate sign is if a supplier employs migrant workers recruited through third party labor brokers. 'Wherever we find foreign migrant workers, we find a heightened risk of modern day slavery,' Viederman says.").

⁸ See CAL. CIV. CODE § 1714.43 (West 2012).

manufacturers doing business in California, and having annual gross receipts over \$100,000,000, to disclose their efforts “to eradicate slavery and human trafficking from [their] direct supply chain” towards their goods.⁹ This is particularly significant given that California’s economy is estimated at \$2.75 trillion, making it the fifth largest economy in the world.¹⁰ Similarly, the United Kingdom adopted the Modern Slavery Act of 2015 requiring every business trading in the UK with a turnover of at least £36m to publish an annual supply chain transparency statement, detailing the steps the company has taken to eliminate human trafficking in its business or supply chain.¹¹ United States Representative Carolyn Maloney introduced the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, which would have amended the Securities Exchange Act of 1934 to require certain companies to disclose measures taken towards identifying and addressing conditions of forced labor within the company’s supply chains.¹² Unfortunately, Congress failed to pass this bill before adjourning, and the executive deadline has since passed.¹³ Despite the failed initiative of the 2015 Act, the United States took a major step in 2015 towards holding companies accountable for goods produced under forced labor by removing the consumptive demand exception in the U.S. Tariff Act of 1930.¹⁴

⁹ *Id.* at § 1714.43(a)(1).

¹⁰ Kieran Corcoran, *California’s Economy is now the 5th-Biggest in the World, and has Overtaken the United Kingdom*, BUSINESS INSIDER (May 5, 2018, 7:09 AM), <https://www.businessinsider.com/california-economy-ranks-5th-in-the-world-beating-the-uk-2018-5> [<https://perma.cc/DD5J-9QBA>].

¹¹ See Katie Kinloch, *Transparency in Supply Chains Reporting-Where Are We Now?*, LEXOLOGY (Apr. 4, 2016), <https://www.lexology.com/library/detail.aspx?g=4bb0fce7-c01f-449f-ade3-0d5b4a98c73b> [<https://perma.cc/V8XK-ZTU7>].

¹² See Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, H.R. 3226, 114th Cong. (2015); UNITED STATES CONGRESS, *All Information (Except Text) for H.R 3226 – Business Supply Chain Transparency on Trafficking and Slavery Act of 2015*, <https://www.congress.gov/bill/114th-congress/house-bill/3226/all-info> [<https://perma.cc/29B2-SH2L>].

¹³ See UNITED STATES CONGRESS, *All Information (Except Text) for H.R 3226 – Business Supply Chain Transparency on Trafficking and Slavery Act of 2015*, <https://www.congress.gov/bill/114th-congress/house-bill/3226/all-info> [<https://perma.cc/29B2-SH2L>].

¹⁴ See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 910(a), 130 Stat. 122, 239 (2016).

The Tariff Act (also known as the Smoot-Hawley Act) included the United States' first major effort in confronting forced labor in Section 307 of the Act,

"All goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision."¹⁵

The original statute included a limitation on this ban, which stated, "in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States."¹⁶

This clause is commonly referred to as the "consumptive demand exception," and has been characterized as a "loophole" and having "swallowed the statute."¹⁷ Before its abolishment in 2015, through the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),¹⁸ the consumptive demand exception dealt a crushing blow to the International Labor Rights Fund's efforts to use section 307 to prohibit the importation of cocoa allegedly produced by forced child labor from Cote d'Ivoire.¹⁹ Now, under the TFTEA, the loophole has been closed and the CBP Commissioner must submit annual reports to the Committee of Finance of the Senate and the Committee of Ways and Means of the House of Representatives on CBP's compliance with section 307 of the Tariff Act.²⁰

¹⁵ 19 U.S.C. § 1307 (2016).

¹⁶ *Id.* (amended 2016).

¹⁷ E. Christopher Johnson Jr. & Nathan J. Chan, *The ABA Model Principles: Not Only a Tool for Compliance, But Also One to End Slavery and Child Labor in Supply Chains*, BUS. L. TODAY, June 2016, at 2; Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 ABA J. LAB. & EMP. L. 1, 29 (2015).

¹⁸ See Trade Facilitation and Trade Enforcement Act § 910(a).

¹⁹ See *Int'l Labor Rights Fund v. United States*, 29 C.I.T. 1050, 1055 (Ct. Int'l Trade 2005) ("The parties agree that no domestic cocoa production industry exists in the United States sufficient to meet domestic consumptive demand. In such instances, the statute expressly prohibits application of *any* of the provisions found within it. As a result, the regulations promulgated pursuant to the statute, which merely direct how Customs will implement the directives of the statute, can neither be invoked nor relied upon by plaintiffs in this case.").

²⁰ See Trade Facilitation and Trade Enforcement Act § 910(b).

The removal of the consumptive demand exception and the expansion of CBP accountability are not the only indicators that the government is increasing CBP's role in combating the use of convict, forced, and indentured labor²¹ in U.S. imported goods. CBP has received funding for nine more customs attachés in U.S. embassies overseas, and CBP also created a Trade Enforcement Task Force within its Office of Trade to focus on combating U.S. imports produced with forced labor.²² Already the effects of CBP's expansion can be felt. Since the 2015 removal of the consumptive demand exception, CBP has banned the importation of six goods,²³ which is significant when considering that CBP had not blocked goods at any point in the 15 years preceding the repeal of the exception.²⁴ CBP seems eager to continue this trend, stating that the "Repeal of [the consumptive demand exception] provides CBP with a more robust ability to consider information and petitions alleging violations of 19 U.S.C. § 1307."²⁵ However, there is still considerable uncertainty in how much authority CBP investigators have in investigating global

²¹ Hereinafter summarized as "forced labor."

²² See Claire Reade & Samuel Witten, *Understanding the US Ban on Importing Forced Labor Goods*, LAW 360 (Apr. 17, 2017), <https://advance.lexis.com/document/?pdmfid=1000516&crd=6bb924c0-0b6b-4164-9f57-9f8d6e352e47&pdworkfolderid=3d25e822-570d-496d-9764-f22c8156c03e&ecomp=pyJtk&earg=3d25e822-570d-496d-9764-f22c8156c03e&prid=1ee625df-928d-490f-bb41-9de1db981073> (last visited Oct. 05, 2018).

²³ See U.S. Customs and Border Protection, *Detention Orders (Withhold Release Orders)*, DEP'T OF HOMELAND SEC., <https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations/detention-orders> [<https://perma.cc/3WXA-XRHY>] (last visited Sept. 17, 2018, 11:04 PM) (listing the five recently banned goods from China as: 1) Soda Ash, Calcium Chloride, and Caustic Soda; 2) Potassium, Potassium Hydroxide, and Potassium Nitrate; 3) Stevia and its Derivatives; 4) Peeled Garlic; 5) Toys. And the one recently banned good from Turkmenistan as: 1) Cotton).

²⁴ See U.S. Customs and Border Protection, *Forced Labor*, DEP'T OF HOMELAND SEC., <https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations> [<https://perma.cc/3LNB-ZLV8>] (last modified Aug. 21, 2018).

²⁵ U.S. CUSTOMS AND BORDER PROTECTION, CBP PUBLICATION NO. 2133-0416, TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015, REPEAL OF THE CONSUMPTIVE DEMAND CLAUSE-FREQUENTLY ASKED QUESTIONS (FAQS), <https://www.cbp.gov/sites/default/files/assets/documents/2016-Apr/tftea-repeal-consumptive-demand-clause-faqs.pdf> [<https://perma.cc/Q8ZY-VB3H>] (last visited Sept. 17, 2018, 10:41 PM).

supply chains, and how much authority they should exercise in their investigations.

B. CBP's Authority to Investigate an MNC's Supply Chain

CBP investigators have broad statutory authority to investigate supply chains. Section 307 of the Tariff Act prohibits entry of, “All goods...produced...*wholly or in part* in any foreign country by...forced labor.”²⁶ The CBP Commissioner is granted authority to enforce section 307 and may conduct investigations as it “appears to be warranted by the circumstances of the case.”²⁷ The “wholly or in part” language of section 307, combined with the broad authority granted to the CBP Commissioner, suggests that even the smallest component of a good, at the lowest tier of a supply chain, is enough to prohibit the importation of the entire good if that component is produced with forced labor.²⁸ CBP seems to embrace this broad interpretation of 19 U.S.C.A. § 1307. It advises “stakeholders in the trade community to closely examine their supply chains to ensure goods imported in the United states are not mined, produced or manufactured, wholly or in part, with prohibited forms of labor”²⁹ Some business experts also share the view that CBP has the authority to investigate every link in a company’s supply chain.³⁰

²⁶ 19 U.S.C. § 1307 (2016) (emphasis added).

²⁷ 19 C.F.R. § 12.42(d) (2017).

²⁸ See T. Markus Funk et al., *Importing Goods with Forced Labor Now Under Stricter Scrutiny*, 11 White Collar Crime Rep. (BNA) No. 6, at 3 (Mar. 18, 2016), <https://www.perkinscoie.com/images/content/1/5/v2/153704/Importing-Goods-Made-with-Forced-Labor-Now-Under-Stricter-Scruti.pdf> [<https://perma.cc/4LAP-L65W>] (suggesting that the “wholly or in part” formulation is of particular significance because it means that even “minor” involvement of forced or prison labor in the manufacturer of a product may taint the entire product.).

²⁹ U.S. CUSTOMS AND BORDER PROTECTION, CBP PUBLICATION No. 0591-1216, COMMERCIAL ENFORCEMENT DIVISION FORCED LABOR ENFORCEMENT, DETAINED SHIPMENTS, https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/Forced%20Labor_Detained%20Shipments%20Fact%20Sheet.pdf [<https://perma.cc/4U52-P95Z>] (last visited September 17, 2018).

³⁰ See Kaitlyn McAvoy, *Supply Chain Mapping is the First Step to New Trade Act Compliance*, SPEND MATTERS (Mar. 14, 2016, 6:15 AM), <https://spendmatters.com/2016/03/14/supply-chain-mapping-is-the-first-step-to-new-trade-act-compliance/> [<https://perma.cc/HU7W-GYVT>] (“[C]ompanies will have to start digging further down in their supply chain to investigate whether this forced labor exists.”); Funk et al., *supra* note 28, at 3 (“The amended Tariff Act prohibition implicates every piece of a product. Even if one small component in a larger product is made using forced, or prison labor, the entire product can be seized. The

While the statutory language of section 307 and CBP statements suggest that CBP has broad authority to investigate a company's supply chain, critics argue the feasibility of investigating every link in the chain as unrealistic. In a report to the United Nations Human Rights Council, Special Representative John Ruggie argues that "Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all."³¹ Some of the difficulty that arises in investigating supply chains for forced labor comes from distinguishing it from voluntary labor.³² While it may be difficult to identify the practice, one thing is certain – forced labor especially occurs in the early stages of merchandise production, several steps down the link in a MNC's supply chain.³³ This difficulty in tracing forced labor down MNC supply chains results in an annual importation into the U.S. market of \$140 billion worth of goods made, in whole or in part, with forms of forced labor prohibited under Section 307.³⁴ Thus, CBP investigations should involve a reasonable approach for combating forced labor in the lower tiers of MNC supply chains.

net result is that use of forced labor in any part of the supply chain, no matter how many steps removed, could potentially result in seizure of goods.").

³¹ JOHN RUGGIE, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY FRAMEWORK 16 (2011).

³² See Carla Susmilch, *Human Trafficking in the Supply Chain: Forced Labor and the Responsibility of Brands and Manufacturers*, SUMERRA, <http://www.sumerra.com/human-trafficking-supply-chain-forced-labor-responsibility-brands-manufacturers/> [<https://perma.cc/HU7W-GYVT>] ("‘You can take a picture of smuggling but you can’t take a picture of coercion. It’s a story.’ This coercion can come in the form of isolation, debts, and/or surveillance. As a result, forced labor is significantly more difficult to recognize.").

³³ See *Monitoring Forced Labour*, ANTI-SLAVERY, <https://www.antislavery.org/what-we-do/work-supply-chains/monitoring-forced-labour/> [<https://perma.cc/A8NK-6SBV>].

³⁴ Sebastien Malo, *Lawmakers Push for US Ban on Slave-made Goods to Sharpen its Bite*, REUTERS (Nov. 30, 2017, 12:52 PM) <https://www.reuters.com/article/us-usa-trafficking-law-analysis/lawmakers-push-for-us-ban-on-slave-made-goods-to-sharpen-its-bite-idUSKBN1DU2O6> [<https://perma.cc/DX23-TTBV>].

SECTION 2: DETERMINING A REASONABLE APPROACH TOWARDS SUPPLY CHAIN ACCOUNTABILITY

Now that CBP is unchained from the consumptive demand exception, it has the opportunity to increase its role in combating forced labor, but it still has the daunting task of deciding its approach towards investigating supply chains. CBP touts broad authority in investigating corporate supply chains.³⁵ However, CBP may not reasonably be able to carry out investigations on every tier of an MNC's supply chain.³⁶ The most reasonable way for CBP to regulate supply chains is to require MNCs to adopt reasonable supply chain accountability programs. These programs should incorporate supply chain accountability tactics that experts agree reduce the likelihood of forced labor. CBP should require MNCs to adopt a tactically sound supply chain accountability program under the threat of an adverse inference that supports a finding of forced labor.

A. Requirement of a Supply Chain Accountability Program

MNCs are better suited for regulating their supply chains than CBP. The responsibility of discovering every supplier in an MNC's supply chain is an unreasonable task for CBP.³⁷ Supply chains are becoming increasingly complex, especially in the multinational sector, and many MNCs simply do not know who their suppliers are beyond the first tier in their chain.³⁸ If an MNC is accused of harboring forced

³⁵ See U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 29.

³⁶ See RUGGIE, *supra* note 31; Susmilch, *supra* note 32; ANTI-SLAVERY, *supra* note 33.

³⁷ See RUGGIE, *supra* note 31; Susmilch, *supra* note 32; ANTI-SLAVERY, *supra* note 33.

³⁸ See Gurjit Degun & Joel Schectman, *Global Supply Chains Increase Complexity of Supplier Risk Analysis*, SUPPLY CHAIN 247 (Dec. 3, 2013), http://www.supplychain247.com/article/global_supply_chains_increase_complexity_of_supplier_risk_analysis/the_economist_insights [<https://perma.cc/9U94-T9QK>] (“Supply chains are getting longer and more complex,” said Janie Hulse, an editor who oversaw the report. ‘But many companies are not even good at gaining visibility into their first tier.’”); Chris Brable, *What is Causing Supply Chain Complexity?*, MPO (July 26, 2017, 8:24 AM), <https://blog.mp-objects.com/what-is-causing-supply-chain-complexity> [<https://perma.cc/4SX6-L3FZ>] (“[A] major concern for supply chain leaders is increasing supply chain complexity. Supply chain complexity is caused by a variety of factors often the result of rising customer expectations for faster lead times, expanded products and services and tailored experiences.”).

labor in its supply chain, but that MNC is ignorant of its suppliers, the burden of discovering those suppliers should not fall on CBP. Consider the manpower and costs that CBP would need to expend in mapping out the supply chain of every MNC under investigation.³⁹ MNCs have an ethical obligation to know their suppliers in the fight against forced labor.⁴⁰ Unfortunately, many MNCs simply do not know who their suppliers are,⁴¹ because they must “source raw materials for their products through complex and opaque supply chains located far from where the finished goods are ultimately sold.”⁴² In its efforts to increase the fight against forced labor, CBP must not allow MNCs to claim ignorance of their supply chains to avoid liability for forced labor under section 307 claims. To achieve this, CBP must hold MNCs accountable for adopting a supply chain accountability program.

The main resolution behind CBP’s requirement of a supply chain accountability program should be to certify that MNCs make reasonable efforts to determine if forced labor occurs in their supply chains. Given the complexity of international supply chains, CBP should allow for flexibility and the customization of a supply chain accountability program based on each MNC’s business model. For instance, it would not make sense to hold an MNC responsible for conducting audits of labor brokers if that MNC’s supply chain does not employ migrant workers.⁴³ Despite allowing MNCs some flexibility in adopting a supply chain accountability program, CBP

³⁹ In an effort to ascertain CBP’s current “willingness” to mapping out and investigating MNC supply chains, the author of this article has made repeated attempts (via telephone, email, CBP websites, and a FOIA request) to obtain guidelines, regulations, or other documents that CBP investigators use in its investigations of companies pursuant to Section 307. These attempts have not resulted in any responses.

⁴⁰ See Amy L. Groff et al., *Top 10 Tips for an Ethical Supply Chain in 2018*, K&L GATES (Jan. 30, 2018), <http://www.klgates.com/top-10-tips-for-an-ethical-supply-chain-in-2018-01-30-2018/> [<http://perma.cc/4PAZ-92XA>] (“How can a company reasonably, but effectively, ensure that its supply chain is responsible and ethical and that it is not utilizing forced or trafficked labor? One way is by mapping its supply chain and another is by conducting strategic audits.”)

⁴¹ THOMSON REUTERS, *supra* note 7 (“[M]ost corporations lack a general understanding of their lower-tier suppliers, and risk becoming accidental supporters of slavery when suppliers employing forced laborers slip into their supply chains.”)

⁴² Groff et al., *supra* note 40.

⁴³ See *infra* § III (for more information on labor brokers and migrant labor).

should also ensure that MNCs are making *meaningful* efforts to combat forced labor instead of merely going through the motions. Presently, many MNCs claim to have supply chain accountability programs, but the due diligence of these programs is often shallow, ineffective, and done in the interest of MNC reputations instead of in the interest of human rights.⁴⁴ To combat ineffective accountability programs, CBP should require that MNCs adopt *tactically sound* supply chain accountability programs that incorporate expert findings on proven methods to combat forced labor.⁴⁵ To achieve this, CBP should not only require that MNCs have a supply chain accountability program that identifies its suppliers, CBP should also promulgate on its website tactically sound methods of reasonable accountability to be incorporated in these programs. Not only are MNCs better suited for knowing and regulating their supply chains, but they have a vested interest in so doing.

CBP has demonstrated that it agrees with this approach and has already taken the first step in establishing such tactically sound supply chain accountability criteria. In July 2016, the Customs Operations Advisory Committee (COAC) established a “forced labor working group” comprised of different members relevant to the issue, such as companies, importers, and NGOs.⁴⁶ Former CBP Commissioner

⁴⁴ See THOMSON REUTERS, *supra* note 7 (“While companies in Western countries have started to conduct audits on their supply chains to identify potential risks like enslaved workers employed by third-party suppliers — in some cases in order to disclose such links to comply with new legislation — some experts say the ethical audits are being done to protect reputations, and are not designed to be thorough. ‘There’s been a growth over the past 10 or 15 years in this industry of ethical auditing,’ says Aidan McQuade, the director of Anti-Slavery International, a UK-based charitable organization that works to eliminate slavery worldwide, ‘which is principally there in order to find nothing, in order to provide plausible deniability for companies.’ Viederman agrees with that assessment. ‘The due diligence that is undertaken by companies is inadequate even to finding slavery at the top tier of their suppliers, much less at a lower tier of manufacturers and in commodity production,’ he says. ‘Even when they’re only looking at first-tier manufacturing they’re generally doing so with fairly superficial approaches that don’t give them information that would highlight the risk of slavery.’”).

⁴⁵ See *infra* § III (for discussion of tactically sound methods CBP should require MNCs to incorporate in supply chain accountability program).

⁴⁶ *Written Testimony of CBP Commissioner R. Gil Kerlikoswke for a House Committee on Ways and Means Hearing titled “Effective Enforcement of U.S. Trade Laws”*, DEP’T OF HOMELAND SEC. (Sept. 22, 2016), <https://www.dhs.gov/news/2016/09/22/written-testimony-cbp-commissioner-kerlikowske-house-committee-ways-and-means> [<https://perma.cc/J9RU-TAZX>].

Richard Gil Kerlikowske testified that this working group “will focus on issues surrounding supply chain and compliance best practices, WRO [(withhold release order)] issuance, and the process for evaluating information provided by importers seeking to have cargo released that has been held over a WRO.”⁴⁷ CBP should continue to work with COAC as it updates its regulations for section 307 enforcement and formulate the criteria for a robust supply chain accountability program that importers in high-risk sectors must satisfy to prevent a section 307 judgment.

It should also be noted that this approach is also consistent with U.S. government’s endorsement of the UN Guiding Principles on Business and Human Rights, which establishes the objective that companies conduct thorough human rights due diligence into their supply chains to ensure they are not contributing to forced labor or other human rights abuses.⁴⁸

B. Improving Accountability of Supply Chains is Beneficial to Corporations

Aside from the ethical reasons for combating forced labor,⁴⁹ there are other desirable reasons for corporations to improve their supply chain accountability under the threat of an adverse inference by CBP. First, and perhaps most obviously, if CBP draws an adverse inference because a corporation is unable to show it has implemented a tactically sound supply chain accountability program, the risk that CBP will bar

⁴⁷ *Id.*

⁴⁸ See OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS’ “PROTECT, RESPECT AND REMEDY” FRAMEWORK 17 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<https://perma.cc/N6XE-CBPL>] (“In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”); *see also id.* at 18 (“Where business enterprises have large numbers of entities in their [supply] chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.”).

⁴⁹ See Groff et al., *supra* note 40.

the importation of that corporation's goods increases. Corporations have a clear financial incentive to avoid this risk of CBP barring their goods from importation.

The second reason why improving supply chain accountability is beneficial to MNCs is that accountability will preserve the MNC's positive image in the public eye.⁵⁰ Americans are motivated to confront forced labor abroad.⁵¹ When human rights abuses, like forced labor, are discovered in a corporation's supply chain, the corporation risks losing favor with the public.⁵² Consider what happened to Apple in 2012.⁵³ When a New York Times report brought allegations of "mass suicide, poor working conditions, and forced labor" against Foxconn, one of Apple's Chinese suppliers, Apple's public reputation took a blow.⁵⁴ The release of the N.Y. Times report in 2012 coincided with a January 2013 stock dive where Apple's stock went from \$705.07 to below \$500, which partly reflects the economic damage that reputational harm can inflict.⁵⁵

However, it does not take a tragedy like the one at Foxconn to damage a corporation's public image. Corporations also run the risk of reputational damage from whistleblower and advocacy groups who may wage "naming & shaming" campaigns on corporations who use

⁵⁰ See *Defining the Business Case: Ethical Recruitment*, WORLD EMPLOYMENT CONFEDERATION, http://www.wecglobal.org/uploads/media/WEC_Business_Case.pdf [<https://perma.cc/AR7B-GE7W>] ("A link to unethical recruitment can severely damage a company's reputation or brand, with potentially significant consequences. Businesses tainted by allegations of forced labour risk "brand contamination," threatening client, investor and other stakeholder relations.").

⁵¹ See *Legal Tools for Alerting Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2223 (2005) ("Although Americans have demonstrated strong interest in improving labor conditions abroad, the current legal regime suffers from an inability to guarantee consistent enforcement.").

⁵² See Joyce G. Mazero & Leonard H. MacPhee, *Setting the Stage for a "Best in Class" Supply Chain*, 36 FRANCHISE L.J. 219, 238 (2016) ("Companies today face potential liability or reputational damages if suppliers commit illegal or unethical acts, such as human rights violations, unethical employment practices, environmental harm, bribery, or corruption.").

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Paul Cahalan, *Apple's Reputation Hit by Poor iPhone Sales, Child Labour*, SUNSHINE COAST DAILY, (Jan. 31, 2013, 6:00 AM), <https://www.sunshinecoastdaily.com.au/news/apples-reputation-hit-poor-iphone-sales-child-labo/1736845/>.

forced labor.⁵⁶ Reputational harm has also been found to impact corporate defendants like Nestle USA, Inc.; Mars, Inc.; and The Hershey Company, Inc., each having been accused of violating the California Transparency in Supply Chains Act.⁵⁷ In addition to preventing findings of forced labor from damaging their public image, corporations “may also improve public relations and employee morale” through a more rigid system of supply chain accountability.⁵⁸ Verité, an NGO dedicated to working with MNCs to improve their supply chain accountability, notes that “Brand ‘contamination’ can be difficult to reverse, and revelations that a company’s supply chain has used forced labor can threaten both existing and future business partnerships and result in a loss of contracts or future business opportunities.”⁵⁹ The vested interest of MNCs in preserving their reputation is a strong justification for CBP to adopt a policy of drawing adverse inferences against MNCs without tactically sound supply chain accountability programs during section 307 investigations.

C. Justification and Precedent for Adverse Inferences

Drawing an adverse inference against an MNC for failure to adopt a supply chain accountability program may, at first glance, seem like an extreme remedy. However, the rule of adverse inferences has a

⁵⁶ Funk et al., *supra* note 25, at 1–2; *see also*, e.g., Joel B. Pollak, *Shock: Amnesty International Blasts Kellogg’s for Using Child Labor-Produced Ingredients*, BREITBART, (Nov. 30, 2016), <https://www.breitbart.com/politics/2016/11/30/kelloggs-child-labor-amnesty-international-wilmar-indonesia/> [<https://perma.cc/79VK-EZWJ>] (detailing Amnesty International’s “slamming” of Kellogg’s and other companies that Amnesty International claims uses child labor).

⁵⁷ *See* Timothy Michno, *Implementing & Administering a Successful Social Compliance Program*, City Bar Center for Continuing Legal Education, New York City Bar, 12th Annual Lawyering in the Fashion Industry: A Practical Guide to Licensing, Trademark Protection & Other Industry Issues (2017), <https://1.next.westlaw.com/Document/I0e2ce00f8bc111e79bef99c0ee06c731/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0> (“Although defendants have generally been successful in obtaining the dismissal of these cases, the reputational impact, expense and distraction associated with even successful litigation can be significant.”).

⁵⁸ Funk et al., *supra* note 28, at 2.

⁵⁹ *Understanding the Role of Labor Brokers in the Human Trafficking and Forced Labor of Migrant Workers*, VERITÉ (2011), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2235&context=globaldocs> [<https://perma.cc/V2VQ-3LB5>].

long history in American jurisprudence.⁶⁰ In fact, other federal agencies, like the National Labor Relations Board (NLRB), draw adverse inferences in certain cases.⁶¹ The authority vested in the CBP Commissioner to enforce section 307 is silent on the issue of adverse inferences:

“If the Commissioner of CBP finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported, he will promptly advise all port directors accordingly and the port directors shall thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation.”⁶²

From this vested authority, the CBP should adopt the policy that an MNC’s lack of a tactically sound supply chain accountability program is information that reasonably indicates the MNC’s merchandise falls within the purview of section 307. Afterwards, the burden would then shift to the MNC to show by “satisfactory evidence” that forced labor was not used to create the merchandise.⁶³ Given that section 307 is silent, or ambiguous at best, on the issue of what CBP should do when a MNC is unable to provide information on the potential use of forced labor in its supply chain, CBP is permitted to provide its own construction on the issue so long as the

⁶⁰ See, e.g., *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.”); See, e.g., *United States v. Roberson*, 233 F.2d 517, 519 (5th Cir. 1956) (“Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position.”); see, e.g., *Tendler v. Jaffe*, 203 F.2d 14, 19 (1952) (“[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.”).

⁶¹ See *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1336–37 (D.C. Cir. 1972) (“[C]ourts have consistently upheld the Board when it has drawn an adverse inference from nonproduction of relevant evidence, and have suggested that in proper circumstances they might reverse the Board for an unexplained failure to draw the inference.”).

⁶² 19 C.F.R. § 12.42(e) (2017).

⁶³ *Id.* at § 12.42(g).

construction is reasonable in the context of the particular statute.⁶⁴ Congress clearly intended for section 307 to apply to MNC supply chains when it included the language “merchandise mined, produced or manufactured wholly or in part in any foreign country” in section 307, but Congress provided no guidance on how CBP should conduct investigations on supply chains.⁶⁵ Permitting the use of adverse inferences is a reasonable construction of the CBP Commissioner’s authority because it will compel MNCs to adopt tactically sound supply chain accountability programs without requiring CBP to exhaust resources towards the overwhelming task of mapping and investigating numerous MNC supply chains.

There is clear precedent for having CBP require MNCs to adopt tactically sound supply chain accountability programs. First, CBP has experience in promulgating and enforcing industry standards in supply chain management through its Customs Trade Partnership Against Terrorism (CTPAT) program.⁶⁶ CTPAT includes a voluntary program in which foreign manufacturers incorporated in Mexico or Canada elect to comply with CBP supply chain security criteria in exchange for certain benefits.⁶⁷ The program closely resembles the proposed supply chain accountability program. The differences are that the supply chain accountability program is designed to combat forced labor and is mandatory under the threat of an adverse inference in a section 307 claim, whereas CTPAT, designed to combat terrorism, is optional and confers certain benefits.⁶⁸

Second, a mandatory supply chain accountability program exists for forced or indentured child labor for executive agencies.⁶⁹ Executive Order 13126 requires executive agencies contracting for the procurement of goods on the Department of Labor’s List of Goods

⁶⁴ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

⁶⁵ 19 U.S.C. § 1307 (2016).

⁶⁶ See generally U.S. CUSTOMS AND BORDER PROTECTION, SECURITY CRITERIA FOR C-TPAT FOREIGN MANUFACTURERS IN ENGLISH, https://www.cbp.gov/sites/default/files/documents/fm_security_criteria_english_3.pdf [<https://perma.cc/HAN7-GNKN>].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 64 Fed. Reg. 32,383 (June 16, 1999).

Produced by Child Labor or Forced Labor to include contractual provisions requiring the contractor to certify it has made good faith efforts towards determining the use of child labor.⁷⁰ This Executive Order also requires the contractor to provide “reasonable access to the contractor’s records, documents, persons, or premises if reasonably requested” by the contracting agency or a relevant government agency.⁷¹

Third, the 2012 Executive Order—Strengthening Protections Against Trafficking in Persons in Federal Contracts—similarly imposes supply chain accountability program requirements on Federal contractors and subcontractors for supplies or services.⁷² This includes requiring contractors and their subcontractors to include contractual provisions allowing access to conduct audits on contractors and subcontractors.⁷³ Thus, CBP already has models in the public sector where it imposes supply chain accountability programs on contractors and subcontractors. CBP should extend similar programs to the private sector to improve MNC supply chain accountability.

A criticism of the proposed “adverse inference approach” is that the absence of a tactically sound supply chain accountability program merely amounts to a “lack of information,” which does not amount to information reasonably indicating that merchandise is, or likely is, within the purview of section 307.⁷⁴ However, this criticism vastly underestimates the importance that information has on combating forced labor in supply chains, especially forced migrant labor.⁷⁵

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *See* Strengthening Protections Against Trafficking in Persons in Federal Contracts, 77 Fed. Reg. 60,029, 60,030 (Sept. 25, 2012).

⁷³ *See id.*

⁷⁴ 19 C.F.R. § 12.42(e) (2017).

⁷⁵ *See* Jeremy Prepscius, *To Avoid Forced Labor in Supply Chains, Build a Functioning Labor-Migration Market*, BUSINESS FOR SOCIAL RESPONSIBILITY (May 26, 2016), <https://www.bsr.org/our-insights/blog-view/to-avoid-forced-labor-in-supply-chains-build-a-functioning-labor-migration> [<https://perma.cc/X78N-PKC2>] (“The key to any market correctly operating is information—both buyer and seller, or employer and employee, need to understand the bargain they are striking. In this case, however, migrants all too often lack the information necessary to make informed decisions, raising the risk of exploitation. Employers are often in the same boat, lacking information about their new hires and the recruitment processes that bring them to the employer. Information arbitrage, where the middleman exploits these gaps in knowledge, exists at many steps in the

Additionally, the recent repeal of the consumptive demand exception, the recent expansion of customs attachés in U.S. embassies overseas, and the creation of the CBP Trade Enforcement Task Force, makes it clear that Congress intends to take a more proactive stance against the importation of goods produced with forced labor. Expecting MNCs to adopt comprehensive supply chain accountability programs is consistent with Congress' demonstrated intent of expanding the fight against forced labor.⁷⁶

Before CBP may begin applying adverse inferences during section 307 investigations, CBP must provide some guidance to MNCs on how they may avoid such an inference. To avoid an adverse inference, an MNC will need to show that it has adopted a reasonable supply chain accountability program. The reasonableness requirement is essential because many MNCs already have supply chain accountability programs, but the clear majority of these programs are woefully inadequate.⁷⁷ But, what constitutes "reasonable"? To establish a reasonable program, CBP should require MNCs to incorporate into their program tactically sound methods of accountability that draw from expert findings.

SECTION III: TACTICALLY SOUND METHODS MNCs SHALL INCORPORATE IN SUPPLY CHAIN ACCOUNTABILITY PROGRAMS

To effectively achieve its mission of banning the importation of goods produced wholly or in part by forced labor, the proposed CBP requirement for MNCs to adopt supply chain accountability programs will need to incorporate accountability tactics that experts agree are proven to be effective. Some methods of investigation have been deemed to be more effective than others, so it will be important for CBP to hold MNCs responsible for adopting accountability tactics that have evidentiary support.⁷⁸ CBP should generally require, with some

recruitment process and is often connected to graft, corruption, and exploitation of the migrant...Transparent information helps companies ensure their new recruits understand and are qualified for the position based on their skills, talents, and aptitudes—the things that actually bring value to the employer—instead of being selected by a middleman based on their ability to pay a bribe.”).

⁷⁶ See *supra* notes 14, 21, 23–26.

⁷⁷ See THOMSON REUTERS, *supra* note 7 (“Viederman says that, based on Verite’s knowledge and his ‘educated opinion,’ under 10 companies are using due diligence programs that would give them a chance of finding serious problems.”).

⁷⁸ See, e.g., Mazero & MacPhee *supra* note 52, at 240 (detailing the Organisation for Economic Co-operation and Development heightened due diligence standard,

flexibility based on each MNCs particular business model, MNCs to include the following in their supply chain accountability programs: identification of high risk areas in the supply chain, the conduction of audits, collaboration with other MNCs through a CBP database, and accountability of labor brokers. During an investigation of a section 307 violation, if an MNC is unable to affirmatively show that it has implemented a tactically sound supply chain accountability program that generally incorporates these factors, CBP shall draw an adverse inference against that MNC.

A. Supply Chain Accountability Programs Should Identify High Risk Areas in the MNC's Business

A tactically sound supply chain accountability program shall require its MNC to consult with available sources in evaluating supply chain links that have a heightened risk of forced labor. Most MNC supply chains operate with many diverse links, meaning the risk of forced labor is higher in some links than others.⁷⁹ John Ruggie states that the first step for a transnational business in conducting human rights due diligence is to “identify and assess the nature of the actual and potential adverse human rights impacts with which [the] business enterprise may be involved.”⁸⁰ He also suggests that:

“Business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.”⁸¹

Fortunately, in the field of forced labor there are publicly available sources that MNCs should use to identify such high-risk goods and areas that have an increased risk of forced labor. One publicly available source for corporations that CBP recommends is the Department of Labor’s List of Goods Produced by Child Labor or

including the use of an independent private sector audit over an internally conducted audit).

⁷⁹ See Phil Cotter, *The Weakest Link in a Global Supply Chain*, THOMSON REUTERS (Jan. 8, 2016), <https://blogs.thomsonreuters.com/answerson/the-weakest-link/> [<https://perma.cc/2QNV-FUQC>] (“Supply chains commonly consist of many diverse links, each vulnerable to different degrees and types of risk.”).

⁸⁰ RUGGIE, *supra* note 31, at 17.

⁸¹ *Id.* at 16.

Forced Labor.⁸² This list includes “goods and their source countries which [the Bureau of International Labor Affairs] has reason to believe are produced by child labor or forced labor in violation of international standards.”⁸³ Another key resource are NGO organizations, who may also provide services to MNCs on evaluating high risk areas. For example, Verité, a U.S. non-profit organization that works with MNCs to improve their supply chain accountability, provides assessment services to MNCs across a wide range of spectrums including by country, sector, and commodity.⁸⁴ By consulting publicly and privately available sources, MNCs will be able to focus their attention on high risk areas of forced labor to better conform with section 307.

B. Supply Chain Accountability Programs Should Involve Accountability of Labor Brokers

To be tactically sound, MNC supply chain accountability programs should affirmatively show due diligence towards investigating and holding each link of its supply chain accountable for the practices of its labor brokers. Labor brokers are “middlemen or intermediaries who facilitate employment for migrant workers.”⁸⁵ As stated in the introduction, “[t]he majority of modern forced labor occurs in the private sector, where half of all the victims are affected

⁸² See U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 25 (“The Department of Labor produces reports on forced labor and importers may also monitor CBP’s website which lists all foreign entities and their commodities subject to an active WRO.”).

⁸³ *List of Goods Produced by Child Labor or Forced Labor*, DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, <https://www.dol.gov/ilab/reports/child-labor/list-of-goods/> [<https://perma.cc/5PDT-AMDT>] (last visited Feb. 8, 2018).

⁸⁴ See *Research*, VERITÉ, <https://www.verite.org/services/research/> [<https://perma.cc/9U2P-USDH>] (last visited Feb. 8, 2018) (“We undertake focused assessments of specific labor issues of concern, as well as large-scale studies of key industries, for corporations, governments, and civil society. In addition, we conduct analyses of country contexts and sectors for socially-minded institutional investors and investment firms. Our research provides the information necessary to understand complex labor problems and to advocate for effective reforms. Our approach is to trace global supply chains at the country, sector, product, and commodity level; map patterns of human trafficking and forced labor, child labor, and other egregious issues; document the scale and nature of recurring labor abuses; and highlight connections between key actors, structures, and policies.”).

⁸⁵ VERITÉ, *supra* note 58.

by debt bondage, ‘in which personal debt is used to forcibly obtain labor.’”⁸⁶ The need to confront labor brokers is additionally imperative given that the global practice of employing migrant workers is increasing.⁸⁷ To be tactically sound, MNC supply chain accountability programs should address the need to protect the growing number of migrant workers in the global economy.

Labor brokers play an essential role in job placement, especially in developing countries, but they also contribute significantly to the rate of debt bondage.⁸⁸ Verité outlines the process in which labor brokers cause debt-bondage during their recruitment:

“[The] recruitment and hiring process, often heavily saddled with debt that results from excessive recruitment and other service fees, and facing any number of coercive circumstances at the workplace exacted by an employer that the worker may be “tied to” as a result of restrictive work-visa regulations. In the labor broker-worker relationship, the terms of work, and the responsibilities of the broker to the worker, are often poorly defined and poorly understood. Once a worker is on-the-job at a foreign workplace—with a large loan and attendant interest payments—it is difficult, if not impossible, to escape. The result is a condition of force that Verité calls the hiring trap; there are few global workplace problems in more urgent need of attention today.”⁸⁹

To curb the risk of debt-bondage induced by labor brokers, CBP should require MNCs to combat the following practices that are found to contribute to debt-bondage: withholding passports, controlling worker bank accounts, placing migrant workers in physical isolation, and levying deductions and withholding wages that further diminish workers’ take-home pay and ability to pay off their debt.⁹⁰

⁸⁶ INTERNATIONAL LABOUR ORGANIZATION, *supra* note 1, at 12.

⁸⁷ See WORLD EMPLOYMENT CONFEDERATION, *supra* note 50, at 1 (“The world of work is changing, and labour mobility is now part of an increasingly dynamic and globalised world. Today, there are an estimated 232 million international migrants across the globe and 150 million of these are migrant workers. Labour markets are increasingly global, and more and more jobseekers are looking beyond national borders for employment and livelihood opportunities. As the International Labour Organisation (ILO) has noted, ‘Migration today is for work.’”).

⁸⁸ See VERITÉ, *supra* note 59 (“[The] widespread system of labor brokerage is often opaque, sometimes corrupt, and largely lacking in accountability. What’s more, the debt and deception that brokers often introduce to the recruitment and hiring process can create critical vulnerabilities to trafficking and forced labor for migrant workers.”).

⁸⁹ *Id.*

⁹⁰ See *id.*

An excellent source for methods in combating the abuse of migrant workers are the ten Dhaka Principles for Migration with Dignity.⁹¹ While adopting all of these principles into an MNC supply chain accountability program is ideal, this article argues that the most reasonable and enforceable way for CBP to combat debt-bondage is to require MNC programs to adopt the Employer Pays First Principle. This Principle mandates that “No worker shall pay for a job—the costs of recruitment should be borne not by the worker but by the employer.”⁹² For the reasons mentioned above, many migrant workers become “trapped” in employment due to having taken a large loan to secure employment, a loan that oftentimes imposes harsh interest rates on migrant workers.⁹³ By incorporating the Employer Pays First Principle into the required supply chain accountability programs, CBP will take a major step towards preventing the importation of goods produced with forced labor by MNCs. Not only will adopting the Employer Pays First Principle reduce the use of

⁹¹ See INSTITUTE FOR HUMAN RIGHTS AND BUSINESS, LEADERSHIP GROUP FOR RESPONSIBLE RECRUITMENT, *Driving Positive Change*, https://www.ihrb.org/uploads/member-uploads/About_the_Leadership_Group_-_Leadership_Group_for_Responsible_Recruitment.pdf [<https://perma.cc/6VG7-Z8D2>] (last visited Feb. 09, 2018) (outlining the following ten Dhaka Principles: “1) No fees are charged to migrant workers; 2) all migrant worker contracts are clear and transparent; 3) policies and procedures are inclusive; 4) no migrant workers’ passports or identity documents are retained; 5) wages are paid regularly, directly and on time; 6) the right to worker representation is respected; 7) working conditions are safe and decent; 8) living conditions are safe and decent; 9) access to remedy is provided; 10) freedom to change employment is respected, and safe, return guaranteed.”).

⁹² Tiffany Robertson, *Addressing Modern Slavery in Global Supply Chains*, THOMSON REUTERS, http://thomsonreutersfinancial.lookbookhq.com/cultureofcompliance/ReducingModernSlavery?utm_campaign=00010WF_CultureOfCompliance_eDM&utm_content=00010WF_CultureOfCompliance_eDM+NovModernSlavery&utm_medium=email&utm_source=Eloqua [<https://perma.cc/TT2T-CVJN>].

⁹³ *Bonded Labor*, END SLAVERY NOW, <https://www.endslaverynow.org/learn/slavery-today/bonded-labor> [<https://perma.cc/68TS-FYFU>] (last visited Nov. 8, 2017) (“The cyclical process begins with a debt, whether acquired or inherited, that cannot be paid immediately. Then, while the worker labors to repay the debt, the employer continues to add on additional expenses. For instance, a laborer may begin with an initial debt of \$200. While working and unable to leave, this worker needs a shelter, food and water. The employer tacks on \$25 per day to the debt to cover those expenses. Consequently, the employee only grows his debt while continuing to labor for his debtor, and repayment is impossible.”).

forced labor, but the Principle has also been shown to improve business for MNCs and their suppliers.⁹⁴

Unfortunately, holding MNC suppliers accountable for their subcontracting arrangements, which often occur with first tier suppliers, is a difficult process.⁹⁵ Labor broker abuses are “typically well beyond the reach of traditional CSR [(corporate social responsibility)] tools, making forced labor and human trafficking in global supply chains often invisible.”⁹⁶ To combat the difficulties in regulating labor brokers, a tactically sound supply chain accountability program must also conduct tactically sound audits.

C. Supply Chain Accountability Programs Should Conduct Tactically Sound Audits

Audits are an essential element of a competent supply chain accountability program, especially in the regulation of labor brokers, so CBP should generally require them in the proposed program.⁹⁷ While audits do have their limits, they are the primary means of

⁹⁴ See, e.g., WORLD EMPLOYMENT CONFEDERATION, *supra* note 50, at 6 (“According to the World Employment Confederation member PALSCON, the Philippines Association of Legitimate Service Contractors, not charging fees to job-seekers means attracting higher-quality clients, better talent among referrals, and increased business opportunities... Providing professional services and not charging fees to workers is also a hallmark of ABADI, the Indonesian Outsourcing Association, another member of the World Employment Confederation. For ABADI, professionalism and a high standard of ethics means becoming a trusted partner to employers, establishing yourself as a “company of choice” and differentiating your company from others in a competitive marketplace. This, in turn, means increased business opportunities.”).

⁹⁵ See *Tool 1: Guidance for the Social Auditing of Forced Labor and Human Trafficking of Migrant Workers*, VERITÉ (2011), <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2236&context=globaldocs> [<https://perma.cc/66VS-YKW9>].

⁹⁶ *Id.*

⁹⁷ See Bill Michels, *Forced Labor in Businesses—Are You Responsible?*, ACCENTURE (Aug. 3, 2017), <https://www.accenture.com/us-en/blogs/blogs-forced-labor-businesses-are-you-responsible> (describing supply chain audits as a “simple, yet effective” method of gaining insight into forced labor.); THOMSON REUTERS, *supra*, note 7 (“Though tracking slave labor can be difficult, experts say there are tell-tale signs companies can look for when conducting their own audits. According to Dan Viederman, the CEO of Verité, a U.S. anti-slavery organization that consults companies — including HPE — on risks in their supply chains, one reliably accurate sign is if a supplier employs migrant workers recruited through third party labor brokers.”).

monitoring supply chains for most companies.⁹⁸ Because the efficacy of audits are often doubted by experts,⁹⁹ it is imperative that CBP require MNCs to adopt tactically sound audits in their supply chain accountability programs.

MNCs may conduct internal audits in two ways: internally or by contracting with a third party. For internal investigations, Timothy Michno, Senior Vice President, General Counsel and Secretary of Kate Spade & Company, outlined the following guidelines for conducting successful audits within supply chains: 1) a preproduction audit for all new factories; 2) internal audits of the existing audits of the existing factory base at least annually; 3) formal training for company-designated auditors and sourcing associates; 4) scheduled and unannounced visits; follow-up on remediation within a reasonable time period; 5) independent, unannounced monitoring of a small percentage of the factory base; 6) training workers on their rights, sometimes using NGOs as trainers; 7) training factory management on hiring and termination procedures and internal grievance systems to develop a sustainable internal factory program, and; 8) meeting with NGOs.¹⁰⁰

The other method of conducting audits is through a third party. These third-party auditors employ many of the same tactics of internal auditors, but have the additional benefit of bearing “no vested interests

⁹⁸ See *Monitoring Forced Labour*, supra note 33 (“Audits are the main monitoring mechanism for most companies. However they have limitations. The quality and scope of auditing may be questionable, or there may be practical difficulties such as auditors being unable to speak with workers in their own language.”).

⁹⁹ See, e.g., Chris Gaetano, *Study: Supply Chain Audits Ineffective at Driving More Ethical Business Practices*, THE TRUSTED PROFESSIONAL (Jan. 17, 2017), <https://www.nysscpa.org/news/publications/the-trusted-professional/article/study-supply-chain-audits-ineffective-at-driving-more-ethical-business-practices-011717> [<https://perma.cc/Y6A8-G66W>] (“A major reason behind this ineffectiveness, according to the study, is the degree of control companies have over the audit itself, from choosing the auditor to deciding the terms of the engagement. The audit itself only goes as deep as the client wants it to go, which often has led to a focus only on Tier 1 suppliers, where the final assembly of products take place. Because clients limit the scope of these audits, most of them fail to account for subcontractors further down the chain.”).

¹⁰⁰ See Michno, supra note 57.

in the outcome of the audit.”¹⁰¹ Verité conducts third party audits, asserting that ideal third party monitors should,

“Rely on local independent resources for expertise and support . . . have an in-depth knowledge of local law and local custom . . . [and] [p]rovide fair, accurate and comprehensive reporting that is based on information confirmed by [offsite] worker testimony and on-site inspection.”¹⁰²

Despite the importance of incentivizing corporations to conduct internal audits, there are reasons to doubt that internal audits alone will be enough to eradicate forced labor in supply chains. Internal audits alone are not entirely reliable. While they do help reveal forced labor, “in many cases it may be hard to know when a subcontractor produces products at a non-appropriate site and then surreptitiously transfers them to an approved facility.”¹⁰³ Another issue is the possibility of suppliers coaching workers to provide desirable answers during an audit.¹⁰⁴ Given issues—such as employees being coached to provide desirable answers—the CBP-promulgated tactic of conducting audits should mitigate these risks by stipulating that MNCs shall require their middle-tier and high-tier suppliers to employ periodic internal audits, and require their low-tier suppliers (where the risk of forced labor is higher) to conduct both regular internal audits, and periodic third-party audits. Third-party auditor practices like conducting interviews of employees outside of the workplace, and discussing the views of their intimidating supervisors, will be more effective at combating forced labor at the root of supply chains.

One potential concern of audits is that corporations may not publicly reveal findings of forced labor by its internal audits because of a fear that CBP will immediately bar the importation of that corporation’s goods. Yet, it is essential for companies to publicly reveal discovered forced labor to expose those suppliers who use forced labor because “collective action aimed at gathering, sharing, and acting on data-derived insights” improves supply chain

¹⁰¹ *The Requirements of Effective Independent Monitoring*, VERITÉ (Dec. 2000), <https://business-humanrights.org/sites/default/files/reports-and-materials/Verite-Independent-monitoring.htm> [<https://perma.cc/2JJH-3BQG>].

¹⁰² *Id.*

¹⁰³ Sean Morris et al., *Supply Unchained: Fighting Labor Abuse in Your Supply Chain*, DELOITTE REVIEW (ISSUE 15) (July 28, 2014), available at <https://dupress.deloitte.com/dup-us-en/deloitte-review/issue-15/fighting-supply-chain-labor-abuse.html> [<https://perma.cc/5WVS-CE77>].

¹⁰⁴ *See id.*

accountability.¹⁰⁵ By publicly exposing suppliers who use forced labor, other corporations will be hesitant to conduct business with those suppliers. To encourage corporations to reveal their findings of forced labor found during their audits, CBP must foster MNC collaboration.

D. Supply Chain Accountability Programs Should Require MNCs to Collaborate Through a CBP Database

Combating forced labor is a challenge that requires collaboration.¹⁰⁶ To encourage corporations to be forthright with their findings during audits, CBP should adopt two policies. First, CBP should operate a database where corporations are required to publish their efforts in mapping and investigating their supply chains. This proposed database will be a major step in ensuring that when an MNC finds that one of its suppliers employs forced labor, other MNCs who also share that supplier in their supply chain will immediately be on notice to take action in confronting that violative link. To encourage the publishing of audit findings and collaborative action, CBP should not take immediate action against MNCs who report the supplier of forced labor. Instead, CBP should grant the publisher and other MNCs a “grace period” to either find a new supplier for that tier in their supply chain, or to eradicate the forced labor in that supplier before CBP invokes section 307 against the MNCs who employ that supplier. This grace period will encourage MNCs to be forthcoming with their results, instead of hiding their findings out of fear of an immediate withhold release order against their merchandise.

One potential criticism of collaboration is that it may jeopardize the competitiveness of MNCs; however, there are methods of collaboration that do not compromise individual MNC positions.¹⁰⁷

¹⁰⁵ *Id.*

¹⁰⁶ See Kilian Moote, *Three Ways to Combat the Risk of Forced Labor in Supply Chains*, SUPPLY CHAIN QUARTERLY (QUARTER 4 ISSUE) (2016), <http://www.supplychainquarterly.com/topics/Global/20161107-three-ways-to-combat-the-risk-of-forced-labor-in-supply-chains/> [https://perma.cc/GGU8-YKVQ] (“It is rare for a company to collaborate with its competitors, especially when it comes to its supply chain. However, addressing forced labor is a shared challenge. In fact, addressing the deep-rooted risks, which are often happening beyond the first tier of suppliers, requires engagement with a company's industry peers.”).

¹⁰⁷ See *id.* (“The Electronic Industry Citizenship Coalition [EICC] for information and communications technologies [ICT] companies, Fair Labor Association [FLA] for garment manufacturers, and Consumer Goods Forum for consumer packaged

Recent efforts of collaboration between MNCs have yielded positive results in combating forced labor.¹⁰⁸ CBP should recognize the success and necessity of collaboration in the fight against forced labor, and institute a database where collaboration is mandated as part of a tactically sound supply chain accountability program.

CONCLUSION

America is waking up to the importance of preventing forced labor around the world. Congress' repeal of the consumptive demand exception is just one of a number of recent efforts to improve MNC accountability and prevent MNCs from importing goods that forced labor has produced. While CBP has the authority to hold MNCs accountable for the use of forced labor in their supply chains, it is infeasible to expect CBP to be able to effectively investigate every link in every MNC supply chain. A realistic way for CBP to hold MNCs accountable for their supply chains is for CBP to promulgate requirements on its website for a supply chain accountability program and compel MNCs to comply with its terms. To ensure that these accountability programs are tactically sound, CBP should require the programs to: identify high risk areas in the MNC's business, involve accountability of labor brokers, conduct tactically sound audits, and require MNCs to collaborate through a CBP database. CBP should draw an adverse inference against an MNC's failure to adopt a tactically sound supply chain accountability program and view the

goods companies are all examples of industry groups working to engage competitors on some of the collective supply chain challenges they face. These types of groups provide an opportunity for industry peers to engage in conversations about shared risks, such as the exposure they all may have to a certain commodity. The discussions, commonly known as pre-competitive forums, can allow for the sharing of effective strategies and best practices that do not compromise their individual businesses' positions.”).

¹⁰⁸ See Kevin Coon et al., *Managing Corporate Supply Chains: Challenges & Successes in the Fight to Combat Forced Labour and Human Trafficking*, BAKER & MCKENZIE, http://www.bakermckenzie.com/-/media/files/newsroom/2016/04/brochure_csb37264_amiller_gsc_1118_v2.pdf?la=en [https://perma.cc/J6BC-74RW] (“[A] recurring theme [in recent collaborative efforts between MNCs] is tremendous value in cooperation and joint action between industry leaders on how best to address the issue of human trafficking and forced labour in their corporate supply chains. This is an area where experienced companies recognize the need to come together and share ideas, practices, successes, and failures, while ensuring a collective commitment to the issue.”).

inference as a reasonable indicator that the MNC's merchandise is within the purview of section 307. It is likely that CBP may find additional criteria for determining a tactically sound MNC supply chain accountability program, and CBP should also allow some room for flexibility based on the MNC's business model.

Forced labor in MNC supply chains is an issue that America wants to confront. It is time for CBP to use its increased authority and funding to hold MNCs to a higher standard in confronting this form of modern-day slavery.